March 5, 2004

Honorable J.L. Edmondson (Chief Judge)
Honorable Gerald Bard Tjoflat
Honorable R. Lanier Anderson
Honorable Stanley F. Birch, Jr.
Honorable Joel F. Dubina
Honorable Susan H. Black
Honorable Ed Carnes
Honorable Rosemary Barkett
Honorable Frank M. Hull
Honorable Stanley Marcus
Honorable Charles R. Wilson
Honorable John C. Godbold
Honorable Paul H. Roney
Honorable James C. Hill
Honorable Peter T. Fay
Honorable Phyllis A. Kravitch
Honorable Emmett Ripley Cox

U.S. Court of Appeals for the Eleventh Circuit
Elbert P. Tuttle United States Court of Appeals Building
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

RE: The Recess Appointment of William H. Pryor, Jr.

Dear Member of the Court:

I am writing to suggest respectfully that a serious question exists as to whether Judge Pryor's recess appointment is constitutional, and that each member of the Court may wish to raise the issue *sua sponte*, so that the validity of his participation in cases can be resolved in advance, without subjecting future decisions to challenge.

Last year, in *Nguyen v. United States*, 539 U.S. 69, the Supreme Court made clear that the question of whether an appellate court panel is properly constituted is so fundamental that a decision by an improperly constituted panel is invalid. In that case, the issue had been raised for the first time on *certiorari*. The constitutional authority of a judge to sit on an Article III court is a jurisdictional issue that may be addressed by a court *sua sponte*, and should be addressed in this way, because litigants will be reluctant to raise the issue themselves until after the court rules in their cases.

The language and purpose of the recess appointment clause strongly suggest that the recess appointment power may be used only during the recess at the end of a Congress or the recess between the annual sessions of Congress, not during an intrasession recess and almost certainly not during the very brief recess in which Mr. Pryor was appointed on Friday, February 20, 2004, since Congress returned to session on the following Monday.

I am enclosing a more detailed analysis of the issue, and I hope you will find it helpful.

With respect and appreciation,
and looking forward to your action,

Edward M. Kennedy

Copies to:
Thomas K. Kahn, Clerk of the Court
The Honorable William H. Pryor, Jr.

MEMORANDUM FOR:

The Judges of the U.S. Court of Appeals for the Eleventh Circuit

RE:

The Validity of the Purported Recess Appointment of
William H. Pryor, Jr., as a Member of the Court

Each member of the Eleventh Circuit has the authority, and, it is respectfully submitted, the obligation to consider and resolve *sua sponte* the question of whether the recess appointment of William H. Pryor, Jr. is constitutional and to do so before Mr. Pryor participates in any case.

Both Article III of the Constitution and the statute governing the appointment of judges to the Court, 28 U.S.C. § 44 (2004), require that the members of the Court be lifetime appointees to the bench whose compensation cannot be reduced. Although the Founders discussed at length the importance of lifetime tenure and protection from salary reductions as critical to the independence of the federal judiciary, the recess appointment clause received little discussion.

No other Article III judge in the nation's history has ever received a recess appointment during a brief holiday period in the midst of a session of Congress. As the cases discussed below demonstrate, each member of the Court asked to sit with Mr. Pryor must ask and answer the question whether Mr. Pryor may properly exercise the authority of an Article III judge.

Because this matter is so urgent, this memorandum does not attempt to provide a full exposition of the facts and law applicable to this matter. That can be done through a suitable order in a particular case or group of cases in which the problem arises. However, the following material may be useful in your initial consideration of the issue.

I. The authority of a federal judge to sit on an Article III court is a jurisdictional question that should be raised *sua sponte,* cannot be waived by the parties, and is not mooted or cured by the presence of a quorum of judges in a particular case whose status is not questioned.

A number of cases decided over the course of the last half-century have established that the constitutional authority of a judge sitting on a court established under Article III is a jurisdictional matter that "relates to basic constitutional protections." *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962). In *Glidden*, the Supreme Court considered challenges to the participation of an Article I judge in a civil appeal to the Second Circuit and the designation of another Article I judge to preside over a criminal trial in a U.S. District Court. *Id*. at 532-33. Because the question of judicial authority was jurisdictional, the Court held that it could properly be considered on appeal despite the failure of any party to raise it in the courts below. *Id*. at 536.

In *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), a panel of the Second Circuit was faced with a motion under 18 U.S.C. § 2255 (1998) challenging a conviction in a narcotics case tried before a recess appointee. The court found that the case involved questions "of equal importance and similar to those considered in *Glidden*" and "raise[d] such important constitutional issues" that those issues could be raised in a collateral proceeding. *Id*. at 707; *see also United States v. American-Foreign S.S. Corp.*, 363 U.S. 685 (1960) (setting aside an *en banc* Second Circuit judgment because a judge lacked statutory authority to participate).

More recently, the Ninth Circuit, in *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (*en banc*), held that the jurisdictional issue presented by a recess appointment required the court to raise the matter on its own motion. *Id*. at 1009. The criminal trial contested in *Woodley* was conducted before Judge Walter Heen, a recess appointee whose nomination for lifetime tenure had been withdrawn before the trial was concluded. On appeal, the defendant failed to raise the question of Judge Heen's authority to preside, but the initial appellate panel considered the matter *sua sponte*. *United States v. Woodley*, 726 F.2d 1328, 1330 (9th Cir. 1983). The *en banc* opinion ruled that "[a]lthough the recess appointment issue was not raised by the parties, this court must examine jurisdictional problems *sua sponte*…. The case at bar presents such a jurisdictional issue." *Woodley*, 751 F.2d at 1009 n.2 (internal citation omitted).

Last year, in *Nguyen v. United States*, 539 U.S. 69, 123 S. Ct. 2130 (2003) (opinion by Justice Stevens, in which Justices O'Connor, Kennedy, Souter, and Thomas joined), the Supreme Court held that a decision rendered by an improperly constituted Court of Appeals panel would be invalidated without assessing prejudice. The Court came to this conclusion despite the fact that two of the three judges on the panel constituted a quorum legally able to transact business, and that the issue was raised for the first time on *certiorari*. Casting these issues aside, the Court stated, "'[i]f the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void….'" *Id*. at 2136 (quoting *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 387 (1893)). The Court determined that the Circuit Court lacked statutory authority to designate the judge in question to the panel that heard the case on appeal, and that as a result, the panel was improperly constituted. The Court went on to say that it "has never doubted its power to vacate a judgment entered by an improperly constituted court of appeals, even when there was a quorum of judges competent to consider the appeal." *Nguyen*, 123 S. Ct. at 2138. "[*N*]*o one* other than a properly constituted panel of Article III judges was empowered to exercise appellate jurisdiction in these cases." *Id*. at n.17 (emphasis in original). The Court therefore vacated the decision of the panel.

The judges of the Court of Appeals for the Eleventh Circuit cannot and should not allow its upcoming cases to be tainted by the presence on any panel or *en banc* of a judge who may well be constitutionally or statutorily ineligible to sit. The decisions in *Glidden*, *Allocco*, *Woodley* and *Nguyen* indicate that the members of the Court risk error by permitting Mr. Pryor to sit without first addressing his authority to do so. They further demonstrate that each judge has the authority to raise the matter *sua sponte*. Thus, any

panel or the Court *en banc* can address this issue before subjecting any cases to the risk of jurisdictional error.

II. The relevant constitutional provisions, statutes, and cases offer several substantial alternative bases for questioning the validity of Mr. Pryor's purported appointment to the Court.

Past controversies on the subject of recess appointments have raised credible objections to recess appointments to Article III courts. Although it is not the purpose of this memorandum to provide a complete exposition of the legal arguments, it should be noted that Mr. Pryor would be unable to sit on your Court were a panel or the Court *en banc* to answer any of these questions affirmatively:

A. Does Article III of the Constitution preclude appointments to Article III courts that do not meet the essential requirements of Article III, lifetime tenure and protection from pay diminution?

Neither the Supreme Court nor this Court has considered whether Article III of the Constitution should be read to preclude any recess appointments to Article III courts. Although two court of appeals decisions, a panel of the Second Circuit in *Allocco, supra*, and the Ninth Circuit *en banc*, by a vote of 7-4, in *Woodley, supra*, declined to adopt this position, each member of this Court would necessarily want to consider the question in reviewing the constitutionality of Mr. Pryor's appointment. Serious weaknesses in the *Woodley* and *Allocco* opinions are discussed in Judge Norris' dissenting opinion in *Woodley*, which provides a lengthy, detailed, and carefully reasoned analysis of the issue, and reaches the conclusion that Article III precludes the application of the recess appointment power to Article III judges. *See Woodley*, 751 F.2d at 1033. Judge Norris' dissent is discussed in more detail below.

Moreover, neither case mentions Congress' statutory expression of its view on the subject in 28 U.S.C. § 44(b) which, using the language of Article III, makes clear that Circuit Court judges must be lifetime appointees. U.S. Const. art. III, § 1 ("The Judges … shall hold their Offices during good Behaviour….").

B. Even assuming Article III permits recess appointments to Article III courts, are they limited to appointments during the recess of the Senate at the end of a Congress or the recess between the sessions of each Congress?

Although no court has ruled directly on this question, the issue was presented in a case involving a non-Article III appointment in the District Court for the District of Columbia in 1993. *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993). In anticipation of a possible amicus filing in that court, Senate Legal Counsel prepared a detailed brief on the proper interpretation of the recess appointment power. *See* 139 Cong. Rec. S8545 (1993). That brief, though never filed, remains a persuasive articulation of the position that the Founders never intended recess appointments to take place other than during the

recess at the end of a Congress or between the sessions (i.e., in the current 108th Congress, the period that occurred in December and January between the end of the First Session and the start of the Second Session). The logic presented in the Senate Legal Counsel's brief would be even more compelling as to an Article III position, where the fundamental value of judicial independence inherent in Article III may require the recess appointment power to be read very narrowly with respect to an Article III judge.

It should be noted that the practice of intrasession as opposed to intersession recess appointments of any kind is a relatively recent phenomenon, without any roots in history. It appears that intrasession appointments were unknown until 1867, and that there were none between 1867 and 1928. Intrasession Article III appointments have been exceedingly rare, almost all in a cluster from 1947 to 1954. There have been none since 1954, until now. *Id.*; Memorandum of the Congressional Research Service (Mar. 2, 2004) (on file with the Senate Judiciary Committee). Moreover, the recent increase in non-Article III intrasession recess appointments means that the need for judicial inquiry is "sharpened rather than blunted." *INS v. Chadha*, 462 U.S. 919, 944 (1983).

C. If recess appointments are allowed at all during an intrasession recess of the Senate, are they improper during brief intrasession recesses, like the one here?

While actions and opinions of the President and the Attorney General extending the scope of Executive power may be seen as self-serving, opinions of the Attorney General suggesting limits on Executive power may be given more weight. Much of the discussion of the limits of the recess appointment power has its roots in a long line of opinions by U.S. Attorneys General.

It was not until 1901 that the question of the flexibility of the phrase "the recess" was addressed in an opinion of any Attorney General. 23 Op. Att'y Gen. 599 (1901). Until that time, every question of recess appointment power that had been brought to the attention of the Attorney General was raised with respect to the official recess between Senate sessions or the recess the end of a Congress. *Id*. In his 1901 opinion, Attorney General Knox was firmly of the belief that "the recess" did not refer to temporary "adjournments" but rather to the intersession recess. *Id.* at 601.

Not until 1921 did an Attorney General advise the President that any period other than the intersession recess would offer an opportunity for the exercise of the recess appointment power. 33 Op. Att'y Gen. 20 (1921). In that opinion, Attorney General Daugherty asserted that a 28-day adjournment during the first session of the 67th Congress constituted a recess during which the president might appoint an appraiser of merchandise in the District of New York. *Id.* Daugherty noted, however, that he did not "think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution." *Id*. at 25. Daugherty's opinion had bracketed the discussion of executive claims of recess appointment power ever since, until the Department of Justice asserted in *Mackie* that there may be no lower limit on the length of a recess that would

allow a recess appointment. *See* Brief of Senate Legal Counsel, 139 Cong. Rec. at S8547.

In the Pryor case, the appointment was announced on the last afternoon of the last business day before resumption of Senate business after a suspension of business during five business days surrounding a three-day federal holiday weekend. In fact, in the entire history of the nation, until the Pryor action, the shortest intrasession recess during which a recess appointment to an Article III Court was made was a 35-day July 4th recess in 1948. Memorandum from the Congressional Research Service (Feb. 27, 2004) (on file with Senate Judiciary Committee).

D. Is Mr. Pryor's competency to serve governed by Congress' specific requirement that judges of the U.S. Courts of Appeals must "hold office during good behavior" (28 U.S.C. § 44(b))?

The recess appointment provision would not be a dead letter even if it were found to be constitutionally limited in one of the ways listed above, because it would still apply to non-judicial appointments. Moreover, Congress has created other non-Article III courts where the judges are not lifetime appointees and are not protected from reduced compensation, and thus might be subject to the recess appointment process without offending Article III.

In the case of the U.S. Circuit Courts, Congress has long made clear that the judges must be Article III judges. The statute governing the Circuit Courts, now 28 U.S.C. § 44(a)-(b) (2004), explicitly requires that appellate judges not only be appointed "by and with the advice and consent of the Senate," as are all high federal officers, but that they also "hold office during good behavior" – i.e., that they be lifetime appointees. *Id*.

These facts suggest that recess appointments to statutorily-constituted Article III courts may violate that statute. The Supreme Court took a similar statutory approach in *Nguyen*, discussed above, in evaluating the authority of a non-Article III judge to sit by designation on a panel of the Ninth Circuit. In *Nguyen*, the Court analyzed the provisions covering the appointment of district judges (28 U.S.C. §§ 133(a) and 134(a)), the language of which closely tracks the provisions concerning the appointment of Circuit Court judges (28 U.S.C. §§ 44(a) and (b)). *Nguyen*, 123 S. Ct. at 2134. The Court concluded that the judge involved did not qualify under the statute as an Article III "district judge" entitled to serve on an appeals panel because he was appointed for a term of years and was removable by the President rather than being entitled to serve during good behavior, as are Article III judges. *Id.*

The *Nguyen* Court determined that the failure to raise the issue below was not a waiver, that the issue could be first raised in the cert petition, that the de facto officer doctrine did not apply, and that the issue was appropriate for the exercise of the Court's supervisory power. The Court would exercise its "power to vacate the judgment entered by an improperly constituted court of appeals, even when there was a quorum of judges competent to consider the appeal." *Id.* at 2138. The Court said that "we believe that it

would 'flout the stated will of Congress', … and call into serious question the integrity as well as the public reputation of judicial proceedings to permit the decision below to stand, for *no one* other than a properly constituted panel of Article III judges was empowered to exercise appellate jurisdiction in these cases." *Id*. at n.17 (emphasis in original). *See also American-Foreign S.S. Corp*., 363 U.S. at 690-91 (vacating an *en banc* decision of a Circuit Court because the senior judge who had participated in the decision was not authorized by statute to do so). The *Nguyen* opinion noted that, "[e]ven if the parties had *expressly* stipulated to the participation of a non-Article III judge…, no matter how distinguished and well-qualified…, such a stipulation would not have cured the plain defect in the composition of the panel." 123 S. Ct. at 2137 (emphasis in original).

III. Even assuming that the Constitution permits some intrasession appointments to Article III courts, the circumstances of Judge Pryor's appointment constitute such an affront to Article III and to the Senate's constitutional role of advice and consent that the action is not within the scope of the recess appointment power.

Judge Pryor's appointment is inconsistent with any of the assumed purposes of the recess appointments clause. The recess during which Mr. Pryor was appointed is the shortest intrasession recess ever used to attempt to appoint an Article III judge. This appointment, to a court with eleven active judges and six senior judges, made on the afternoon of the last business day before the day the Senate session resumed, and to a vacancy that had been open and the subject of confirmation proceedings long before the recess, cannot be justified as urgently necessary for the conduct of the Court's business or because the Senate was, due to the brief recess, unavailable to provide advice and consent regarding the nomination.

The vacancy Judge Pryor seeks to fill occurred on December 18, 2000, over three years before his recess appointment was made. The occasion for the vacancy was Judge Cox's taking senior status. Judge Cox continues to sit on the Court. After another nominee was withdrawn, Judge Pryor was nominated on April 9, 2003, early in the First Session of the 108th Congress. Hearings were held on his nomination in the Senate Judiciary Committee in June 2003. Follow-up questions were submitted to the nominee thereafter. The Committee had begun an investigation on an ethical issue brought to its attention in early July 2003. According to statements by Committee members at the Committee's public meeting on the nomination, that investigation was never completed. The Committee nevertheless voted out the nomination on July 23, 2003, with nine of its nineteen members voting against reporting the nomination to the full Senate and one voting to report, but noting that the investigation had raised "serious" issues which would bear further scrutiny. *See* Senate Judiciary Committee Minutes and Transcripts for each date, on file with the Senate Judiciary Committee.

During the first session of the 108th Congress, the full Senate twice considered Judge Pryor's nomination. Each time, acting pursuant to the Senate's longstanding rules for considering such matters, adopted under its constitutional rule-making power in

Article I, the Senate declined to confirm Judge Pryor's nomination to the Court. On December 2, 2003, the First Session of the 108th Congress adjourned, and the recess between the First and Second Sessions began. The Second Session of that Congress began on January 20, 2004, forty-eight days later.

On Monday, February 16, the Senate observed the Presidents' Day holiday. The Senate did not meet for business the day before the holiday weekend and the four business days afterwards. Late in the day on the last business day of that week, Friday, February 20, 2004, the White House announced the recess appointment of Judge Pryor, and according to media reports, Judge Carnes administered the oath of office that day. The Senate was in session the next business day, Monday, February 23, 2004.

The circumstances of Mr. Pryor's recess appointment make clear that the action was taken to evade the constitutional requirement of advice and consent, rather than to serve any legitimate constitutional goal. If a President can make a recess appointment during a brief intrasession holiday break, with no new problem or urgency attributable to that break, there is nothing to prevent a President from doing so whenever the Senate recesses overnight or on a weekend. Such a radical interpretation of a narrow power would nullify the Framers' decision that the Senate and the Executive must share the appointment power.

IV. If Judge Pryor is permitted to sit on any cases, the independence required of judges by the Constitution will be seriously compromised.

Judge Norris, in his *Woodley* dissent, offers a powerful "cautionary tale" by recalling Senator Joseph McCarthy's questioning of Justice Brennan, who then held a recess appointment to the Supreme Court. Justice Brennan was asked to express views on the definition of Communism with potentially significant implications for cases that were pending before the Court. *Woodley*, 751 F.2d at 1015 (Norris, J., dissenting).

Judge Norris's 1985 dissent in *Woodley*, 751 F.2d at 1023, also considers various hypotheticals raising serious separation of powers concerns that recess appointees might face, including *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *United States v. Nixon*, 418 U.S. 683 (1974). It is not difficult to imagine similar concerns today.

The Framers recognized that an independent judiciary is the essence of justice -- "independent not in the sense that [it] shall not co-operate [with the other branches] to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each [branch] shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments." *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933). That vital goal cannot be achieved if judges of an Article III court must serve with both the Congress and the President actively looking over their shoulders.

V. Conclusion: If the court does not consider the issues of the validity of Judge Pryor's appointment immediately, any case in which he participates may be constitutionally tainted.

As discussed above, the question of each judge's authority to participate in a case is jurisdictional, and can be raised by the members of a court *sua sponte*, by a party, or by a reviewing court, including the Supreme Court, at any stage of a proceeding. The cases make clear that neither the *de facto* officer doctrine nor claims of harmless error suffice to cure the problem. To avoid the waste of judicial time and resources, it is important that this issue be addressed and resolved before Mr. Pryor participates in any cases. Because this issue is of such overriding importance, implicates several issues which the Supreme Court itself has taken a position on, and falls squarely within the Supreme Court's supervisory power over this Court, it is likely that the issue will not be completely resolved until the Supreme Court also has the opportunity to review it. It is therefore important for the members of this Court to act as expeditiously as possible concerning this issue.

[Note: This memorandum will be given wide circulation and made available to counsel for all potentially affected parties on the website http://Kennedy.Senate.Gov .]